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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

MOTION TO AFFIRM

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QUESTIONS RESTATED

The Modification of Final Judgment ("MFJ") in this case grants the United States the structural relief it has sought in over thirty years of antitrust litigation with the Bell System. Under the MFJ, the Bell System is engaged in a massive reorganization in which it will divest its local exchange functions as of January 1, 1984. The questions presented in these appeals are:

1. Whether direct Supreme Court review of the challenges to the MFJ and the prompt elimination of the uncertainty that threatens a vital national industry is "of general public importance in the administration of justice" within the meaning of the Antitrust Expediting Act?

2. Whether States may, consistent with the Supremacy Clause, nullify the MFJ and prevent its implementation by interposing regulatory statutes that have already been held *not* to immunize the Bell System from antitrust remedies?

3. Whether the District Court abused its discretion in entering a judgment, by consent of the parties, that substantially achieves the Justice Department's antitrust objectives?

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Interstate and Foreign MTS and WATS, Second Report and Order, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)	4
Interstate and Foreign MTS and WATS, Third Report and Order, 67 F.C.C.2d 1255 (1978)	4

	Page(s)
MCI Telecommunications Corp., Investigation into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service, 60 F.C.C.2d 25 (1976), *rev'd, MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978)	6
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North Carolina Utilities Comm'n v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)	4, 5
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Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975)	5
Swift & Co. v. *United States*, 276 U.S. 311 (1928).	18
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United States v. *AT&T*, 461 F.Supp. 1314 (D.D.C. 1978)	8
United States v. *AT&T*, 524 F.Supp. 1336 (D.D.C. 1981)	8
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United States v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976)	19, 26
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United States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963)	16
United States v. *Swift & Co.*, 286 U.S. 106 (1932).	20
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Washington Utilities & Transportation Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975)	5
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H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974)	15, 16, 28
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H.R. 3333, 96th Cong., 1st Sess. (1979)	9
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H.R. 6121, 96th Cong., 2d Sess. (1980)	9
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S. 622, 96th Cong., 1st Sess. (1979)	9
S. 2827, 96th Cong., 2d Sess. (1980)	9
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Appellants,

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UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

MOTION TO AFFIRM

On August 24, 1982, the District Court, with the consent of the parties, entered the Modification of Final Judgment ("MFJ") in this case. This judgment orders a structural reorganization of American Telephone and Telegraph Company ("AT&T")[1] and its subsidiaries ("the Bell System") that achieves the Justice Department's antitrust objectives in its over three decades of litigation with the Bell System. However, the existence of legal challenges to the MFJ, no matter how insubstantial, profoundly affects the Bell System's ability to implement this judgment and to provide telephone service for the nation while proceeding with this massive reorganization. The resulting uncertainty has foreclosed the Bell System from the debt markets in which it has traditionally raised essential capital, left its more than one million

[1]Appellee Western Electric Company is a wholly-owned subsidiary of AT&T. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company. This statement is made pursuant to Rule 28.1.

employees unsure of where they will be working, and inhibited, impeded, and complicated investment, regulatory, and operational decisions both by the Bell System and the telecommunications industry as a whole.

The only way to put a timely end to this potentially crippling uncertainty is for these appeals to be decided by this Court this term, pursuant to the Antitrust Expediting Act. Moreover, the appeals are each so insubstantial that they all may be summarily affirmed, without burdening this Court's docket. AT&T therefore moves for summary affirmance of each of the appeals.

STATEMENT OF THE CASE

Throughout this century, the Bell System has provided integrated, end-to-end telephone service. The Bell System's wholly-owned Bell Operating Companies ("BOCs") have franchised monopolies that provide local exchange telecommunications service for approximately eighty percent of the nation's telephone subscribers under state public utility regulation. The BOCs' local exchange facilities also originate and terminate both *intra*state long distance ("intercity") calls regulated by the States and *inter*state intercity calls regulated by the Federal Communications Commission ("FCC") under the Communications Act of 1934, 47 U.S.C. §151 *et seq.* The BOCs also own interexchange facilities that provide intercity transmissions for both intrastate and interstate calls, whereas AT&T's Long Lines Department owns portions of the network used exclusively for interstate transmissions.

The Bell System is technologically integrated. Through Western Electric Co., it manufactures equipment for use by Bell System Companies in providing telecommunications service. Through Bell Telephone Laboratories, the Bell System conducts basic research and development. The BOCs have each executed License Contracts with AT&T that require them to make payments to AT&T to fund research, development, and central support for their activities.

In the past thirty-five years, the Justice Department has twice, in 1949 and 1974, filed civil actions under the Sherman Act that sought major structural reorganizations of the Bell System. In each case, the Justice Department alleged that the structure of the Bell System provides it with both the incentive and the ability to leverage its power in the regulated monopoly markets to foreclose or impair competition in related competitive markets.

This Action And The 1956 Judgment. This action was commenced in 1949 in the United States District Court for the District of New Jersey. Because state and federal regulatory authorities then required certificated telephone carriers to maintain end-to-end responsibility for telecommunications service, the only area of Bell System operations in which competition was feasible was equipment manufacturing. The Department's complaint alleged that the Bell System had monopolized this market and sought (Prayer, paras. 10-18) both the divestiture of Western Electric and the compulsory, nondiscriminatory licensing of all Bell System patents for reasonable royalties.

In January, 1956, the parties stipulated to the entry of a Final Judgment that did not require the divestiture of any major part of the Bell System. However, in allowing the Bell System to preserve its integrated character, the Final Judgment essentially limited the Bell System to providing regulated communications services and manufacturing the equipment used for such services[2] and compelled the licensing of all Bell System patents on reasonable terms. On January 24, 1956, the District Court entered the Final Judgment upon its presentation by counsel for the parties.

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[2]Sections II(i) and V of the Final Judgment limited AT&T and the BOCs to, with some exceptions, the provision of "communications services . . . the charges for which are subject to public regulation under the Communications Act of 1934 [or state laws]." Section IV of the Final Judgment limited Western Electric to manufacturing equipment of a type used by AT&T and the BOCs in providing communications services subject to public regulation.

Events Between 1956 and 1974. In the ensuing two decades, technological developments and changes in regulatory policies introduced competition into major new areas of telecommunications.

In a series of decisions in the late 1960s and 1970s, the FCC authorized telephone subscribers both to attach customer provided equipment to telephone company terminals and, more importantly, to substitute their own equipment for the carrier provided equipment that is located on a customer's premises and that provides access to the telephone network ("customer premises equipment" or "CPE").[3] States opposed these FCC decisions, claiming that the competitive provision of CPE would drive the prices of the equipment down to cost and thereby jeopardize the States' abilities to establish above-cost rates that could subsidize basic services and promote their traditional universal service objectives.[4] The States further argued that because they regulated intrastate telephone service, they had plenary authority under the Communications Act of 1934 (47 U.S.C. §§152(b)(1), 221(b)) to prevent the use of customer provided CPE for any intrastate telecommunications service, notwithstanding that CPE was also used in common for interstate service.

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[3]*Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968); *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605 (1968), *reconsid. denied*, 18 F.C.C.2d 871 (1969); *Interstate and Foreign MTS and WATS, First Report and Order*, 56 F.C.C.2d 593 (1975); *Telerent Leasing Co.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Interstate and Foreign MTS and WATS, Second Report and Order*, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Interstate and Foreign MTS and WATS, Third Report and Order*, 67 F.C.C.2d 1255 (1978).

[4]See, *e.g.*, *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); see generally *United States* v. *AT&T*, No. 74-1698 (D.D.C.), Stipulation Package No. 7 (paras. 10-18, 52-56) (hereinafter referred to as "Stipulation Package No. ").

The Bell System supported the states' claims, but they were rejected. The FCC was held to have paramount regulatory authority over facilities jointly used for intrastate and interstate communications. The states' plenary regulatory authority, in contrast, was held to be limited to those facilities "separable from and . . . not substantially affect[ing] the conduct or development of interstate communications." *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *accord, North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1045-46 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). These decisions gave rise to an intensely competitive industry ("interconnect industry") in which hundreds of firms such as IT&T, Rolm, Exxon, Northern Telecom, Tandy, and others began furnishing CPE and other equipment to telephone subscribers for interconnection to the telephone network. See Stipulation Package No. 42B.

Another series of decisions under the Communications Act introduced competition into the provision of intercity services. These decisions authorized specialized common carriers to provide specified intercity services[5] and required franchised local exchange carriers to provide the new entrants with interconnections to their local distribution networks and to originate and terminate intercity calls for them. These decisions were opposed by the Bell System and by some States as well.[6] Each contended that, by allowing specialized common carriers selectively to serve high density routes, the decisions would disrupt the nationwide averaged rate structure, weaken the ability of interstate services to

[5] *Allocation of Frequencies in the Bands Above 890 mc*, 27 F.C.C. 359 (1959), *reconsid. denied*, 29 F.C.C. 825 (1960); *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *reconsid. denied*, 21 F.C.C.2d 190 (1970); *Establishment of Domestic Communications—Satellite Facilities by Non-Governmental Entities*, 22 F.C.C.2d 86 (1970); *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[6] See, *e.g.*, *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

support local rates through the jurisdictional cost separations processes, and thereby jeopardize the ability of regulatory commissions to set rates to achieve universal service goals. Nonetheless, by the late 1970s and early 1980s, the authority of these competing carriers had been expanded to the point that they could participate in the transmission of any interstate call, either through their own facilities or through resale of the services of Bell System companies.[7]

Finally, technological developments during the twenty-five years after entry of the 1956 Judgment substantially eliminated the earlier distinctions between regulated telecommunications service and unregulated data processing. These developments created actual and potential competition between telecommunications carriers and data processing vendors in the provision of CPE, enhancements of basic telecommunication services, and information services.[8]

[7]See *Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers*, 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *American Tel. & Tel. Co., Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939 (1976); *MCI Telecommunications Corp., Investigation into the Lawfulness of Tariff F.C.C. No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976), *rev'd, MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *amended on reconsid.*, 62 F.C.C.2d 588 (1977), *aff'd sub nom. AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980), *reconsid. denied*, 86 F.C.C.2d 820 (1981).

[8]See, *e.g.*, *First Computer Inquiry*, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973); *American Telephone & Telegraph Co. (Data Speed 40/4)*, 62 F.C.C.2d 21 (1977), *aff'd sub nom. IBM* v. *FCC*, 570 F.2d 452 (2d Cir. 1978); *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer & Communications Industry Ass'n* v. *FCC*, No. 80-1471 (and consolidated cases) (D.C. Cir. November 12, 1982).

Despite the technological developments that characterized this period generally, local exchange functions have largely retained their natural monopoly characteristics. Providers of CPE, intercity services, and information services continue to require access to local exchange facilities to compete in these markets.

1974 Case. In 1974, the United States brought a second civil antitrust action under the Sherman Act against the Bell System, *United States* v. *AT&T, et al.*, No. 74-1698 (D.D.C.). The Government alleged that intervening events demonstrated that the 1956 Judgment did not prevent the Bell System from monopolizing telecommunications equipment markets and that the Bell System had further, through control of its franchised local exchange monopolies, unreasonably restrained competition in the intercity service and CPE markets in which the FCC had introduced competition. The Department again sought the structural separation of the Bell System's monopoly activities from its other businesses, praying for the divestiture of the BOCs and the divestiture and dissolution of Western Electric. Complaint, Prayer, paras. 3-5. The Justice Department thereafter modified its prayer for relief to seek divestiture only of those parts of the Bell System that provide local exchange functions.[9]

AT&T moved to dismiss this suit on the ground that, although it has no blanket antitrust immunity, the specific conduct at issue was subject to pervasive federal regulation—and complementary state regulation—and thus was impliedly immune from the Sherman Act.[10] The District Court twice denied this motion, holding that neither federal nor state regulation immunized AT&T from this suit for structural relief, and the Court of Appeals and this

[9]Stipulation Package 82; see *Plaintiff's First Statement of Contentions and Proof*, pp. 526-27 (November 1, 1978).

[10]AT&T also sought to dismiss claims in the case on the grounds that the 1956 Judgment was *res judicata*, but these claims were also rejected by the District Court. *United States* v. *AT&T*, 1976-2 Trade Cas. ¶61,097 (D.D.C. 1976).

Court denied AT&T's petitions to have this ruling reviewed. *United States* v. *AT&T*, 461 F.Supp. 1314, 1320-21 (D.D.C. 1978); *United States* v. *AT&T*, 427 F.Supp. 57 (D.D.C. 1976), *cert. denied*, 429 U.S. 1071 (1977), *cert. denied*, No. 77-1009 (D.C. Cir. May 27, 1977), *cert. denied*, 434 U.S. 966 (1977).

After the Bell System's threshold defenses were rejected, the District Court established innovative procedures to expedite its pretrial proceedings and trial. *United States* v. *AT&T*, *supra*, 461 F.Supp. at 1343-49. These procedures enabled the completion of discovery, the narrowing of the issues, and the commencement and substantial completion of the trial within the next three and a half years.

Trial of the case commenced in March, 1981. In each of the three major areas of the case—CPE, intercity services, and telecommunications equipment—the Government's proof consisted of evidence, vigorously disputed by AT&T, that the Bell System had intentionally abused its control over its franchised local exchange monopolies to discriminate against competitors and to cross subsidize its prices in competitive markets. At the close of the Government's case, the District Court held that there had been sufficient evidence to put AT&T to its proof and denied AT&T's motion to dismiss. *United States* v. *AT&T*, 524 F.Supp. 1336 (D.D.C. 1981); Tr. 14909-10.

Throughout the period of the 1974 case, the FCC and Congress extensively debated a number of issues raised by the 1974 case and the 1956 Judgment. Both forums considered the adoption of regulatory or legislative devices to prevent or reduce the possibility that AT&T would abuse its local franchise monopoly to obtain advantages in related competitive markets.[11] A focal point of the

[11]See, *e.g.*, FCC CC Docket No. 78-72 (exchange access); *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980); FCC CC Docket No. 80-742 (License Contracts); FCC CC Docket No. 80-53 and No. 19129 (Phase II) (Bell System Procurement Practices); H.R. 12323, 94th

(Footnote continued on next page)

debate was whether and to what extent the 1956 Judgment would and should foreclose AT&T from participating in markets in which computer technologies had merged with the technologies that provide telecommunications services and in which traditional rate of return regulation had ceased to be appropriate.[12] The FCC's decision in one proceeding that raised this issue—the *Second Computer Inquiry*—led AT&T and the United States on March 4, 1981, to begin to litigate the question of the proper interpretation and scope of the 1956 Judgment.[13]

AT&T had vigorously contended, in all of these forums, that it had not abused its control of its local exchange monopolies and that the public interest would best be served by maintaining the end-to-end integration of the Bell System. Nevertheless, it had

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(Footnote continued from previous page)
Cong., 2d Sess. (1976); H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979); H.R. 6121, 96th Cong., 1st Sess. (1979); S. 2827, 96th Cong., 2d Sess. (1980); S. 898, 97th Cong., 1st Sess. (1981); H.R. 5158, 97th Cong., 1st Sess. (1981).

[12]See, *e.g.*, H.R. 6121, 96th Cong., 2d Sess. §218 (1980); S. 898, 97th Cong., 1st Sess. §229 (1981).

[13]In the *Second Computer Inquiry*, *supra*, 77 F.C.C.2d 384 (1980), the FCC established a new nontariff form of regulation for the Bell System's CPE and its enhancements of basic telecommunications service. Because the Justice Department had taken the position that the 1956 Judgment would bar AT&T from continuing to provide these services once this new regulatory scheme was implemented, AT&T moved for construction of the Final Judgment on March 4, 1981. The Memorandum in Support of The Motion For Construction further stated (p. 17) that the 1956 Judgment had become "obsolete and unjustifiable" and that the only "long term resolution" of the problems it raised was to vacate it or modify it to reflect the changed environment. In an order issued on September 23, 1981, the District Court held that, as written, the 1956 Judgment allowed the continued provision of CPE and enhanced services, despite the change in the form of public regulation. The United States' appeal from this order was subsequently dismissed on the ground that the proposed modification of the Final Judgment had eliminated any controversy between the parties. *United States* v. *Western Electric Co.*, No. 81-1960 (3d Cir. February 2, 1982). See also J.A. 82 n.198.

become increasingly apparent that continuing the Bell System's present ownership of local exchange monopolies along with competitive operations would be a source of increasing controversy and uncertainty. Even if it won *United States* v. *AT&T*, the Bell System's common control over franchised local monopolies and competitive businesses would unavoidably expose it to future antitrust challenges and to onerous legislative and regulatory restrictions. And if the 1956 Judgment were held to foreclose Bell System participation in computer and other markets that had merged with traditional telecommunications, the Bell System's ability to continue to innovate and enhance its services would have been severely impaired.

The Modification Of Final Judgment. Against this background, AT&T concluded that the best way to end the uncertainty and to obtain freedom from the constraints of the 1956 Judgment and from continuing antitrust exposure was to agree to the precise structural reorganization that the Justice Department was seeking in the 1974 case: the divestiture and complete separation of the Bell System's local exchange functions from its intercity, CPE, and manufacturing businesses. Thus, on January 8, 1982, AT&T and the United States stipulated to the entry of a modification of the 1956 Judgment that would achieve the Justice Department's objectives.[14]

The proposed modification required that, within eighteen months of its entry, the Bell System be split between its local exchange functions and other functions, through a number of discrete steps. Exchange boundaries (or "local access and transport areas" ("LATAs")) must be drawn to determine which facilities are intraexchange facilities to be divested and which are interex-

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[14]Simultaneously with the filing of this stipulation, the parties voluntarily dismissed the 1974 Case pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

change facilities that AT&T will retain.[15] See §IV(G); J.A. 178-79. AT&T must then transfer to the BOCs—or to a BOC-owned central staff organization—resources to enable them to provide local exchange functions independently of AT&T after divestiture. §I(A)(1); J.A. 174. The BOCs' facilities and resources relating to local exchange functions must then be separated by transferring the CPE and interexchange facilities to newly created entities. §I(A)(2); J.A. 174. And the License Contracts and other contracts that integrate the BOCs with the rest of the Bell System must be terminated. §I(A)(3); J.A. 174. Finally, the local exchange carriers ("divested BOCs") must be spun off. §I(A)(4); J.A. 174-75.[16] Because this structural reorganization eliminates the whole basis for the 1956 Judgment, the proposed modification vacates the injunctive provisions of that judgment in their entirety. J.A. 173.

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[15]Specifically, LATA boundaries determine which traffic is interexchange traffic and which is intraexchange traffic. LATAs thus allow the preponderant use of facilities to be measured for the purpose of making ownership determinations at divestiture. See also §VIII(G); J.A. 184. The sole significance of LATAs after divestiture is that they define the areas in which the divested entities provide local exchange functions and define prohibited interexchange services. See §§II(A), (B) & (D); J.A. 175-76.

[16]A series of corporate transactions will be required to reconfigure the BOCs as local exchange companies and to spin them off from AT&T. To separate exchange and non-exchange assets, the Bell System plans that each BOC will create two wholly-owned subsidiaries, one to which the BOCs' interexchange facilities will be transferred and another to which the BOCs' customer premises equipment (CPE) will be transferred. The BOCs will then distribute the stock of these subsidiaries to AT&T which, as a result, will hold its ownership of the BOCs' exchange facilities separately from its ownership of the BOCs' interexchange and CPE assets. AT&T will then create seven new subsidiaries and transfer to these companies the stock of the BOCs that provide exchange service in each of seven regions of the country as well as one-seventh ownership interests in the central staff organization. AT&T will then spin off the regional companies by distributing its stockholdings in those companies to existing AT&T stockholders. See *Plan of Reorganization* (filed in District Court December 16, 1982), pp. 440-71.

The proposed modification also imposes restrictions on the divested BOCs. It requires that they provide exchange access to all interexchange carriers that is equal in type and quality to that provided AT&T and prohibits discrimination in favor of AT&T and its affiliates in procuring equipment. §§II(A), (B), Appendix B; J.A. 175-76, 187-90. To assure that the BOCs may not themselves obtain competitive advantages through abuse of control of their local exchange facilities, the proposed modification prohibited the BOCs from providing interexchange services, information services, CPE, and any services other than exchange and exchange access service or natural monopoly services actually regulated by tariff. §II(D); J.A. 176.

No services will be discontinued as a result of the MFJ. All the facilities and personnel providing telephone service before divestiture will continue to provide telephone service after divestiture. The difference will be that new AT&T affiliates will retain the Bell System's CPE and interexchange facilities and functions in each State while the separately owned BOCs will provide local exchange service.

Public Interest Proceedings. After the modification was proposed, this case was transferred to the United States District Court for the District of Columbia. The District Court recognized that any significant delays in the decision to enter the proposed modification would threaten a vital national industry. J.A. 148-49, 205-06; see also April 8, 1982 Order, pp. 5-6. At the same time, because of the proposed modification's enormous significance, the District Court, with the parties' consent, ordered procedures—which it conducted with great expedition—that gave the general public rights of participation that went beyond those prescribed by the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§16(b)-(h) ("Tunney Act"). After over 600 individual comments on the proposed modification were received, the District Court ordered additional briefing on eight broad sets of issues, conducted a two day nonevidentiary hearing on June 29

and June 30, 1982, and afforded all commentors an opportunity to indicate, through explicit offers of proof, whether a further evidentiary hearing would be necessary to resolve any issues related to its public interest determination. See May 25, 1982 Memorandum, p. 4.

Many commentors challenged the effectiveness or appropriateness of specific provisions of the proposed modification. All the States and state commissions, directly or through their national association, filed comments that also challenged the proposed modification's effectiveness on far more fundamental grounds. Each noted that splitting the Bell System pursuant to the MFJ would require a number of one-time transactions that, under the literal terms of the applicable state statutes, could not occur without explicit prior state regulatory approval. Each argued that the States, which generally opposed the split, had "unassailable authority to veto" the divestiture and to cause a "balkanized scheme of telephone service."[17] Because these claims went to the question whether the Decree could be effective, all conceded that this issue should be resolved as part of the District Court's public interest determination. See J.A. 37 n.100.

On August 11, 1982, the District Court issued a 178-page opinion concluding that the basic split of the Bell System was an entirely appropriate antitrust remedy and obviously in the public interest. J.A. 58, 66. The Court's opinion rejected nearly all the challenges to specific provisions of the proposed modification. J.A. 73, 75, 77, 79, 101-04, 106, 124. The Court rejected the States' claims that they could block or undo the implementation of the Decree, holding that prior approval requirements were effectively preempted, but *only* to the limited extent they might be invoked to block the one-shot transactions. J.A. 47-48. The Dis-

[17]Joint Comments of Alabama, 23 other states, *et al.* p. 12; Arizona Comments, pp. 7, 10, 13-15; see also Michigan P.S.C. Comments, p. 6; Alabama P.S.C. Comments, pp. 4-5; Maryland P.S.C. Comments, pp. 7-11; District of Columbia Comments, p. 12; National Association of Regulatory Utility Commissions ("NARUC") Comments, pp. 30-42. In all, some sixty-six state and state utility commissions as well as NARUC filed such comments.

trict Court did conclude that several changes would have to be made in the proposed modification before it would be approved, including a provision that the divested BOCs be permitted to provide, but not manufacture, CPE. J.A. 104-109. The District Court stated that it would promptly approve a modification that adopted its proposed revisions. J.A. 172.

On August 19, 1982, the Department of Justice filed a memorandum (pp. 1-2) stating that it was prepared to agree to all the District Court's proposed revisions because "the alternatives available would pose unacceptable costs to the public interest." However, the Department urged the District Court to reconsider its position on CPE in one respect. In the Department's view, the divested BOCs could be allowed to market "simple CPE" immediately. In contrast, it stated that their provision of "complex CPE" could pose greater competitive dangers and that a decision on BOC entry into these markets should be postponed until a hearing could explore the competitive costs and benefits of BOC participation. *Id.*, pp. 2-3. On August 23, 1982, the District Court rejected the Department's proposal. J.A. 196-200. On August 24, 1982, the parties stipulated to the entry of the Modification of Final Judgment that contained all the District Court's proposed revisions, and it was entered later that same day. Although the MFJ gives the Bell System until February 24, 1984, to implement the reorganization, financial considerations dictate that it must be completed by January 1, 1984. Tr. 25130, 25456-57.

On August 26, 1982, the District Court authorized approximately 110 public and private entities and organizations to intervene in this case for purposes that include appeal of the entry of the Modification Of Final Judgment. J.A. 192-94; see J.A. 201-203. Eighteen appeals were filed, one of which (Jack Faucett Associates, Inc.'s) has been dismissed. On November 10, 1982, the District Court, pursuant to the Expediting Act (15 U.S.C. §29(b)), issued an order directing that the appeals be taken directly to this Court. J.A. 204-208.

REASONS FOR SUMMARY AFFIRMANCE

This case epitomizes the Government antitrust actions in which Congress intended to retain direct Supreme Court review of a District Court's final judgment. To subject this case to the delays of the ordinary appellate processes would threaten a critical national industry. The questions presented in the appeals, moreover, are purely legal issues that can be readily decided by this Court. Indeed, each of the four appeals is so appropriate for disposition by this Court and the issues which they raise are so insubstantial that the judgment below should be summarily affirmed.

I. Expedition Of These Appeals Under The Expediting Act Is A Matter Of Paramount Public Importance.

In the Antitrust Expediting Act, 32 Stat. 823, *as amended*, 15 U.S.C. §29(b), Congress found that public antitrust cases can have an enormous "impact on the economic welfare of this nation," that they "are unlike other cases," and that it is often necessary and appropriate to expedite the final decision in such cases by making final judgments directly appealable to this Court. H. R. Rep. No. 93-1463, 93d Cong., 2d Sess. 14 (1974); see S. Rep. No. 93-298, 93d Cong., 1st Sess. 3-4 (1973); *United States* v. *California Co-operative Canneries*, 279 U.S. 553, 558 (1929). In the 1974 amendments to the Act, Congress eliminated the previous requirement that there be direct Supreme Court review in all Government antitrust cases, see 15 U.S.C. §29(a), finding that the requirement imposed an undue burden on this Court, particularly in cases requiring review of voluminous records.[18] However, Congress retained direct appeals for those

[18]See S. Rep. No. 93-298, *supra*, p. 8 (1973); Hearings Before The Subcommittee On Antitrust and Monopoly Of The Judiciary Committee On S. 782 and S. 1088, pp. 16, 113 (1973); Hearings Before Subcommittee On Monopolies and Commercial Law On H.R. 9203, H.R. 9947 and S. 782, pp. 36, 183 (1973); S. Rep. No. 91-1214, 91st Cong.,

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Government antitrust cases in which "the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. §29(b). In such cases, the Act provides that this Court may then either "dispose of the appeal . . . in the same manner as any other direct appeal" or remand it to the appropriate court of appeals, where it will be subject to the ordinary appellate procedures. *Id.*

The Expediting Act, however, was not intended to "bestow on the Supreme Court an unqualified discretion to hear or not hear a case." H.R. Rep. No. 93-1463, *supra*, pp. 13-14 (1974). On the contrary, Congress "intended that the Supreme Court hear cases that are of general public importance in the administration of the antitrust laws." *Id.* The standard for direct appeals is *not* that the case raises novel or unsettled legal issues or is otherwise immediately review-worthy. *Compare* 28 U.S.C. §1254(1) (Supreme Court review prior to judgment in the Court of Appeals).[19] To the contrary, Congress intended to expedite cases that have "serious

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2d Sess. 2 (1970); H.R. Rep. No. 91-1129, 91st Cong., 2d Sess. 3-6 (1970) (reprinting letter from Attorney General of the United States). In making these findings, Congress relied on the earlier statements of members of this Court. See *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n.1 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 364-65 (1962) (Harlan, J., concurring). But see *United States* v. *Singer Manufacturing Co.*, 374 U.S. at 197 (White, J., concurring).

[19]The legislative history of the 1974 Amendments sharply distinguishes between the standards under 28 U.S.C. §1254(1) and those under the Expediting Act:

> "The Committee was well aware that under current law—Section 1254 of title 28, U.S. Code, which is not affected by this legislation—either party may by-pass the court of appeals and seek direct review by the Supreme Court. The Committee does not intend to duplicate or displace that through its amendment. Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. The Committee amendment does not. It is intended that the Supreme Court hear cases on direct review that are of general public importance in the administration of the antitrust laws." H.R. Rep. No. 93-1463, *supra*, pp. 13-14 (1974).

legal and economic consequences going beyond the mere private interests of the individual litigants" as well as those that are independently review-worthy.[20]

The appeals from the entry of the MFJ present precisely the kind of case that Congress intended to preserve for direct Supreme Court review—regardless of the merits or legal significance of the questions presented. As the District Court repeatedly found (*e.g.*, J.A. 33, 148-49, 153, 205-06), the implementation of the MFJ implicates a most fundamental national interest. The Bell System provides services critical to the national economy and the national defense, and it must continue to provide vital service while it engages in a massive undertaking to comply with the MFJ before January 1, 1984. Any significant delays in the final judicial resolution of whether, when, or how the Bell System is to be restructured would create uncertainty that would threaten the Bell System network and severely jeopardize its ability to serve the public during this critical period. It would mean that the Bell System would continue to be all but foreclosed from the debt markets from which it traditionally has raised most of the outside capital necessary to maintain and improve the network,[21] that operational and regulatory decisions would be severely inhibited and impeded, and that the Bell System's more than one million employees would be unsure of where they will be employed. As the District Court found, significant delays in the final resolution of this case will "disrupt AT&T's own operations," "inhibit investment and other business decisions necessary

[20]Hearings Before Subcommittee On Antitrust and Monopoly On S. 782 and S. 1088, pp. 32, 41 (March 15, 1973) (quoting S. Rep. No. 91-1214, 91st Cong., 2d Sess. 4 (1970) and H. R. Rep. No. 91-1129, 91st Cong., 2d Sess., 6 (1970), reprinting the position of the Attorney General of the United States).

[21]Since the MFJ was proposed on January 8, 1982, the Bell System has not issued any BOC bonds, its traditional method of raising much of the outside capital needed to finance the approximately $18-$20 billion required each year for expansion and modernization. Tr. 25130, 25456-57.

to the maintenance and improvement of the telecommunications network," "jeopardize the ability of the Bell System's components to raise the outside capital needed for the modernization and expansion of [the] network," and "adversely affect the entire telecommunications industry and thus, indirectly, the nation as a whole." J.A. 148-149; see also April 8, 1982 Order, pp. 5-6.

Expedition of the appeals under the Expediting Act will end this uncertainty and the accompanying risks to the public at the earliest possible time. In contrast, to remit the appeals to the ordinary procedure of initial review in the Court of Appeals, petitions for certiorari, and possibly further review in this Court could extend an intolerable "state of limbo" (*id.*, p. 6) beyond the date that the Bell System is required to complete the divestiture. See J.A. 205-06. A failure to expedite could hold the most severe adverse consequences for the public. Nor would retaining jurisdiction over these appeals create a precedent that would burden the docket of this Court. This case of unprecedented economic importance to the public is the first time that the Justice Department has sought expedition of an appeal in the eight years since Congress amended the Antitrust Expediting Act.

II. The Appeals Have No Substance And Should Be Summarily Affirmed.

The appeals that have been filed from the entry of this antitrust judgment call for immediate consideration by this Court. Unless there is a claim of fraud, mistake or lack of jurisdiction, "a decree . . . rendered by consent is always affirmed, *without considering the merits of the cause.*" *Swift & Co.* v. *United States*, 276 U.S. 311, 323-24 (1928) (Sherman Act consent judgment) (emphasis added; citations omitted); *accord, NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961). A District Court's approval of a settlement in a case affecting the public is otherwise reviewable, if at all, only to determine whether the court abused its discretion in agreeing with the parties that the settlement was reasonable and

in the public interest.[22] In the Tunney Act—whose procedures were adopted by the District Court—Congress did not intend to change the standard of review of consent decrees.[23]

Two different types of appeals have been filed from the entry of the MFJ. First, Illinois, Maryland and thirteen other States have challenged the jurisdiction of the District Court to enter any Decree—whether litigated or by consent—that unconditionally orders structural relief requiring asset transfers and other transactions that would otherwise require state approval under regulatory statutes.[24] Second, Tandy and the North American Telephone Association ("NATA") challenge the MFJ on the ground that isolated provisions of the MFJ do not order relief that, in the views of these parties, would be desirable. Both sets of appeals are wholly insubstantial and should be summarily affirmed.

[22]See, *e.g.*, *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771-72 (2d Cir. 1975) (settlement of employment discrimination suit); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980) (Fair Housing Act); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-50 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (Title VII); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) (settlement of antitrust class action); *Young* v. *Katz*, 447 F.2d 431, 432-33 (5th Cir. 1971) (settlement of class action stockholder suit). See also *United States* v. *Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (government antitrust consent decree). The only circumstance in which a court has employed *de novo* review is where the District Court *refuses* to enter the proposed consent decree. See *United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980).

[23]The Tunney Act procedures were enacted to assure that the District Court would be fully informed before deciding whether to enter a proposed decree, *not* to alter the pre-existing case law as to when consent decrees may properly be entered. H. R. Rep. No. 93-1463, *supra*, pp. 11-12 (1974); S. Rep. No. 93-298, *supra*, pp. 3-6 (1973). See *United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127, 1141-42 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 44-45 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976).

[24]The majority of the States that raised this issue in the court below and their national association (see p. 13 n. 17, *supra*) did not join in these appeals.

A. The States' Claim That They May "Veto" The Implementation Of The MFJ Is Contrary To The Sherman Act and The Supremacy Clause.

The basis for the States' challenge to the District Court's jurisdiction to enter the MFJ is that each State has statutes that provide for public regulation of intrastate telephone service and that require, among other things, prior state regulatory approval before a regulated firm may convey or transfer any facilities used to provide intrastate service. As the States recognize, the MFJ orders the BOCs to transfer CPE and interexchange facilities used to provide intrastate service and to engage in similar one-shot transactions that would otherwise require prior approval of state agencies. The States further assert, erroneously, that the MFJ will conflict with their ongoing regulation of intrastate telephone service after the divestiture is concluded. The States' claim is that a Sherman Act judgment cannot order conduct inconsistent with state law and that the MFJ must therefore be set aside.

The States' claims are extreme, startling, and wholly without merit. If they were valid, no decree could be entered under the Sherman Act—whether litigated or by consent[25]—that unconditionally ordered the restructuring of a regulated utility.[26] A Sherman Act decree would only be advisory and could, at most, order the parties to use their "best efforts" to obtain necessary state

[25]Litigated decrees and consent decrees are both "judicial acts", *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932); *Pope* v. *United States*, 323 U.S. 1, 12 (1944), and neither may be entered unless found to be appropriate antitrust remedies and within the public interest. Litigated decrees and consent decrees are accorded equal preemptive effects. *United States* v. *Swift & Co.*, *supra*, 286 U.S. at 114-15; *Delaware Valley Citizens' Council For Clean Air* v. *Pennsylvania*, 674 F.2d 976, 980-81 (3d Cir.), *cert. denied*, 51 U.S.L.W. 3287 (October 12, 1982); *United States* v. *ASCAP*, 442 F.2d 601 (2d Cir. 1971); J.A. 38-39 n. 102.

[26]The effect on the States would have been identical if the 1974 case had been litigated to judgment and the Government had obtained the relief it sought, or even if a judgment had been entered by default.

regulatory approval. Whether and to what extent a decree could be implemented would be committed to future regulatory proceedings in 51 different jurisdictions, each of which could block or condition the Decree's implementation and produce, in the States' own words, "balkanization."

This Court has repeatedly held that the Supremacy Clause of the Federal Constitution forecloses any claim that the existence of state laws or state regulation can limit the power of federal tribunals to effectuate federal law. For example, where federal administrators have adopted regulations to carry out federal laws, the Supremacy Clause forbids the States from interposing local laws—even when they are valid for all other purposes—to prevent or impede the regulation from being immediately effective. See *Fidelity Federal Savings & Loans Ass'n* v. *de la Cuesta*, U.S. , 50 U.S.L.W. 4916 (June 28, 1982); *California Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958) (preempting prior approval statute). Similarly, in fashioning remedies to effectuate federal law, federal courts have the authority to order conduct that is inconsistent with local laws, and no claim can be made that state law operates as a limitation on the federal court's jurisdiction:

> "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution . . . [t]he federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court." *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 695-96 (1979).

See also *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958); *North Carolina* v. *Swann*, 402 U.S. 43, 45 (1969).

The States here insist that different principles apply under the Sherman Act because of the existence of pervasive public utility

regulation. The short answer to this claim is that no State challenges the earlier holdings that state regulation of the Bell System is not so extensive or comprehensive that it immunizes the conduct at issue in the 1949 and 1974 cases from antitrust remedies. Nor could any such claim be made. The MFJ is designed to create more competitive conditions in interstate markets in which the FCC introduced competition and which are outside the states' plenary regulatory authority.

Because Congress did not intend that state regulation would be a substitute for Sherman Act controls over AT&T in these cases,[27] Congress could not have intended that the States have "unassailable authority" to block or condition the implementation of relief. Once it is determined that state regulation does not immunize a defendant from antitrust controls, the federal court must have the power to enter a decree that effectuates antitrust policy, even if it requires conduct that conflicts with state statutes that are valid for all other purposes. Otherwise, federal antitrust jurisdiction would be effectively transferred to 51 different regulatory commissions and antitrust enforcement against interstate businesses would be "balkanized," contrary to the obvious intent of Congress.[28] As Judge Greene correctly stated in rejecting the states' argument, the "practical consequences of such a rule to antitrust enforcement could be devastating." J.A. 45.

[27]Although AT&T does not claim a blanket immunity from the antitrust laws, it does contend that some of its specific conduct was so integrally related to pervasive federal regulation that it should not be subjected to a trial under the different standards of the antitrust laws with respect to *that conduct*. See *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716 (9th Cir. 1981), *petition for certiorari pending*, No. 81-2359.

[28]Because the interstate telecommunications network is a single interactive network, the Commerce Clause of the Federal Constitution would prevent the States from unreasonably blocking transactions and "balkanizing" its effective operations even if there were no Sherman Act. See, *e.g.*, *Edgar* v. *Mite*, U.S. , 50 U.S.L.W. 4767 (June 23, 1982); *FERC* v. *Mississippi*, U.S. , 50 U.S.L.W. 4566 (June 1, 1982). Where, as here, the transactions are required to implement a federal statute, the lack of state authority follows *a fortiori*.

The States' argument that *Parker* v. *Brown*, 317 U.S. 341 (1943), dictates a different result in this case is meritless. It proceeds from a fundamental misconception of both the state action exemption and the MFJ. *Parker* v. *Brown* and its progeny, to be sure, establish that the Sherman Act was not intended to prevent States from "supplanting competition with regulation" (Md J.S. p. 11), or to "[destroy] the States' power to engage in economic regulation," *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978). Thus, an "actively supervised" and "clearly articulated" state regulatory scheme may not be invalidated merely because there is a conflict between the statute and the central policy of the Sherman Act. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

But contrary to the State's suggestions, the MFJ does *not* invalidate any state statute. It is directed to private parties, not state officials. And it interferes with state regulation in only one limited respect; it unconditionally orders a one-shot realignment of assets within the present Bell System (from the BOCs to new AT&T affiliates). Although the MFJ effectively preempts state prior approval and related requirements *insofar as* they could block, impede, or undo the divestiture ordered by the MFJ, these statutes will remain valid for all other purposes.

The States' assertions that the MFJ will interfere with their ongoing regulation of intrastate telephone service is erroneous. First, Maryland's Brief is simply wrong in stating (p. 14) that LATA boundaries will be periodically reconfigured after the divestiture and that there will be ongoing transfers. The only purposes of the LATA boundaries are to govern the *one-time* split of the Bell System and to define the areas in which the divested BOCs are to provide exchange and exchange access services. These boundaries do not affect the states in their regulatory determination as to whether a telephone call is charged for as a flat rate call

or toll call—as the earlier public interest proceedings made explicit.[29]

Second, the reorganization neither removes any facilities from service nor requires the competitive provision of any service. What it does is realign the resources of the Bell System so that AT&T will retain control of CPE and interLATA facilities now on the books of the BOCs. The States will be able to exercise all their existing regulatory authority over the entities that result from the reorganization. They may regulate rates for intrastate service to the full extent of their statutory authority and, in connection therewith, may value the assets used to provide this service and apply their prior approval requirements to transactions relating to intrastate service. Contrary to Illinois' claim (J.S. 20-21), they may similarly regulate all aspects of the relationship between independent telephone companies and the newly created Bell entities. A state commission may order the BOCs to interconnect with the independents for the joint provision of intraLATA toll service, order AT&T to interconnect with independents to provide joint interLATA service, and regulate the division of charges between them. See, *e.g.*, Ill. Rev. Stat., Ch. 111⅔, pars. 8, 29. Despite Maryland's contrary argument (p. 14), States will continue to be free to treat intrastate toll service as a regulated monopoly and to pursue whatever regulatory policies they choose—as the District Court explicitly recognized (J.A. 46-47, n.117).[30] There, accordingly, is no basis for any claim that the MFJ supplants ongoing state regulation.

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[29]See, *e.g.*, Justice Department's Competitive Impact Statement, pp. 45-49; AT&T Reply Comments, pp. 21-24.

[30]The reason that the BOCs' interexchange facilities are being transferred to AT&T is to create more competitive conditions in the provision of *inter*state intercity services for which the facilities are also used, *not* to supplant any state policy relating to intrastate service.

B. Tandy's and NATA's Challenges To The MFJ's Treatment Of CPE and Patent Licensing Are Frivolous.

In contrast to the States' broad challenge to the District Court's jurisdiction, NATA and Tandy have appealed from the entry of the MFJ on the narrow grounds that its provisions relating to CPE and patent licensing do not, in their views, sufficiently promote competition. Quite apart from the fact that Tandy and NATA are competitors with their own antitrust remedies and no apparent litigable interests in this case, their appeals are frivolous. Their claims misconceive the nature of consent judgments and the role of appellate courts in reviewing them.

A judgment entered by consent is normally a compromise. "[I]n exchange for the saving of cost and the elimination of risk the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *accord, Carson* v. *American Brands, Inc.*, 450 U.S. 79, 86-88 (1981). In the Tunney Act, Congress intended to encourage the continued use of consent decrees. Contrary to Tandy's claim (J.S. 12, 18), the fact that isolated provisions of a consent decree may not afford all the antitrust relief that "conceivably" could have been ordered after trial can never be grounds for disapproving a decree, for that is the very essence of a consent judgment. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850-51, 863 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The appropriateness of a decree depends on whether it, when considered as a whole, is a reasonable compromise and consistent with the overall public interest. See, *e.g., United States* v. *Gillette Co.*, 406 F.Supp. 713, 716 (D. Mass 1975) (Aldrich, J.).

Tandy's arguments are based on the premise (see Tandy J.S. 12, 15, 18) that a court reviewing the entry of a consent judgment

may pick and choose among its provisions and selectively rewrite them. This premise is false. Because the provisions of the decrees are interrelated and represent a single bargain, appellate courts are "powerless to rewrite the provisions of a settlement agreement" lest they change a provision that was essential to one party's assent. *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 772 (2d Cir. 1975) (Mansfield, J.); *accord*, *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 850-51.[31]

Against this background, the claims that the District Court acted improperly in approving the MFJ are spurious. Even when analyzed in isolation, the CPE and patent licensing provisions promote antitrust objectives and, in any event, are reasonable compromises between conflicting positions. And when they are considered, as they must be, in the context of the MFJ as a whole —which orders the precise structural relief that the Justice Department sought in three decades of litigation—no claim can be made that the District Court abused its discretion in approving the MFJ.

1. The CPE Provisions Of The MFJ Do Not Vitiate The Decree.

Although Tandy and NATA are both participants in the CPE market, they challenge the CPE provisions of the MFJ on grounds which are at odds with one another. NATA contends that the MFJ should have prohibited the divested BOCs from providing CPE at all. Tandy, in contrast, supports the decision to allow the BOCs to provide CPE, but it objects to the fact that they will be divested without any retail outlets. The fact that two

[31] *Accord*, *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶61,659 at 72,717 (E.D.Pa. 1977); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 42 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976); see generally *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964).

market participants take these inconsistent positions should, by itself, demonstrate that the MFJ's treatment of the issue is not outside the zone of reasonableness.

The entire basis for NATA's claim is that the modification proposed by the parties on January 8, 1982, prohibited the BOCs from offering any CPE. NATA appears to contend that the District Court should have deferred to the initial position of the Justice Department and approved the modification in the form in which it was originally proposed. However, the question whether the January 8, 1982, proposal was properly rejected is not before the Court; neither the parties nor NATA have sought appellate review of that decision. NATA's argument that courts should give great weight to the Justice Department's views supports the conclusion that the MFJ was properly entered. The Department consented to the MFJ that was entered on August 24, 1982, on the basis that it was in the public interest.

More fundamentally, it is frivolous of NATA to suggest that the treatment of CPE creates such great potential for competitive abuse that the MFJ must be vacated in its entirety. The MFJ significantly reduces any threats to competition resulting from BOC participation in these markets. By prohibiting BOC manufacturing of CPE and ordering the transfer of the BOCs' CPE and CPE-related resources to AT&T, the MFJ ends the integration of the BOCs' existing customer premises equipment businesses with their exchange services and assures that any BOC that reenters the market after divestiture will not have an embedded CPE business to support discriminatory conduct or cross-subsidization. See J.A. 104-09, 196-200.

Tandy's position that the BOCs should be divested with their phone stores would have made the MFJ even less consistent with the Department's antitrust objectives; franchised local exchange monopolies would have retained aspects of an embedded CPE business. Moreover, because the BOCs will be divested without any CPE and because some divested BOCs may choose not to

enter this business, it would have been inconsistent to assign the stores to the BOCs. Nor will the division of assets have any adverse effect on the competitiveness of the CPE market. Indeed, each divested BOC that chooses to enter this business in the future will have customer contacts that will enable it rapidly to establish a market presence, as the District Court found. J.A. 108 n. 248. Therefore, there is nothing in the CPE provisions of the MFJ that is unreasonable, much less that would vitiate the MFJ.

2. The Termination Of Mandatory Patent Licensing Was Entirely Appropriate.

Tandy's argument that the District Court should not have approved termination of the 1956 Judgment's requirement of compulsory patent licensing without first conducting an evidentiary hearing is also frivolous. Much of the attractiveness of consent judgments is that they avoid the expense, delay, and uncertainty of litigation. For this reason, the Tunney Act makes it explicit that a District Court should resort to trial-type hearings "only where it is imperative . . . for the purpose of eliciting additional facts," S. Rep. No. 93-298, *supra*, pp. 6-7; H. R. Rep. No. 93-1463, *supra*, p. 8, and that the District Court has broad discretion in selecting the procedures to make its public interest determination. 15 U.S.C. §16(e), (f). This discretion was not abused.

First, Tandy is in no position even to object to the failure to hold a hearing. It failed to comply with the District Court's request in its May 25, 1982, Memorandum that any person who proposes an evidentiary hearing make an explicit showing as to the necessity of a hearing, its duration, and the number and types of witnesses and other participants.[32] In any event, the issues

[32]Specifically, the District Court's Memorandum of May 25, 1982, stated (p. 4) that any person who believed an evidentiary hearing to be necessary "shall state why the issue cannot be resolved without such a hearing, the precise purpose of the proposed proceeding, its estimated duration, the number and type of witnesses and exhibits to be adduced, and the identities of others who would be expected to participate in the hearing." Tandy did not even purport to attempt to comply with this order.

Tandy now identifies as appropriate for hearing (J.S. p. 14) are so vague and diffuse that they would have defied judicial resolution within any reasonable period of time.

Second, the termination of the patent licensing provisions was entirely reasonable. Indeed, as the Justice Department argued below, "retaining the requirements in the context of the divestiture mandated by the modification would, itself, be anticompetitive." Br. of United States In Response to District Court's May 25, 1982 Mem., p. 50. The patent licensing requirement was previously imposed—without any adjudication of liability or any opportunities for public comment—*in exchange* for preserving the integrated Bell System. Its premise was that patents funded in whole or in part by revenues from franchised monopolies should be made available to all. See Justice Department's Competitive Impact Statement, pp. 44-45. Because the MFJ orders the divestiture of franchised monopolies and ends the License Contracts, the premise for the 1956 Judgment's provision vanishes. To impose an unconditional requirement on the post-divestiture AT&T to license all its patents when its competitors are under no such obligation would disserve, not promote, the purposes of the antitrust laws. J.A. 78-79 and n.191.

CONCLUSION

The District Court has shown that a trial court can expeditiously manage big antitrust cases and assure that the uncertainty that they create does not imperil vital national industries. The expedition of this appeal under the procedures Congress has established will enable the judicial system to continue to protect these public interests.

For the reasons stated, the appeals from the entry of the MFJ should be decided by this Court. Each is so lacking in merit that they all should be affirmed summarily. This will remove the uncertainty that threatens the national telecommunications network and clouds the Bell System's operations while it proceeds with the largest corporate reorganization in our nation's history.

Respectfully submitted,

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